

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 65 OF 2014**

**IN THE MATTER** of an application by the plaintiff under  
*section 113 of the High Court Rules 1998*

**BETWEEN :** **DALIP KUMAR** by himself his family and other occupants of Tuatua,  
Labasa, occupation unknown

**APPELLANT**(ORIGINALDEFENDANT)

**AND** : **MACUATA TIKINA HOLDING LIMITED** a limited liability  
company having its registered office at Ground Floor, Ratu  
Raobe building, Nanuku Street, Labasa

**RESPONDENT**

**Counsel** : Mr. S. Sharma, for the Appellant  
Mr. S. Valenitabua, for the Respondent

**Judgment and hearing:** 5<sup>th</sup> July 2016

**Introduction**

1. This is an appeal from the decision of the Master made in terms of Order 113 of the High Court Rules of 1988. The Plaintiff - Respondent ( the plaintiff) had instituted this action in terms of the Order 113 of the High Court Rules of 1988 for the eviction of the Defendant - Appellant ( the Defendant) from the premises more fully described in the Originating Summons. The Master granted the orders in terms of the said summons, thus an order for eviction was made on 21<sup>st</sup> January, 2016. This is an appeal from the said order

2. Preliminary Issue was raised by the counsel for the Defendant in terms of the Order 59 rule 17 of the High Court Rules of 1988
3. Order 59 rule 17 of the High Court Rules of 1988 deals with the 'procedure after filing the appeal and it reads as follows;
  - 17(1) *the appellant shall, upon serving the notice of appeal on the party or parties to the appeal file an affidavit of service within 7 days of such service.*
  - (2) *The appellant shall, within 21 days of the filing of notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.*
  - (3) *If this rule is not complied with, the appeal is deemed to have been abandoned.'*
4. The perusal of the file would indicate that the "Notice and Grounds of Appeal" was filed on 1<sup>st</sup> February, 2016 but had not filed Summons for Directions as required by the Order 59 rule 17(2).
5. In the circumstances the resulting position is that the 'appeal is deemed to have been abandoned' in terms of the Order 59 rule 17 (3) of the High Court Rules of 1988. The appeal is struck off and dismissed.
6. Without prejudice to what is stated above I will deal with the merits below.
7. In *C M Van Stillevoeldt BV v El Carriers Inc* [1983] 1 All ER 699 at 700-701 Griffiths LJ held,
 

*'The plaintiffs submit that my jurisdiction is the same as that of a judge in chambers when hearing an appeal from a master or registrar. It is well settled that in such cases the judge is in no way fettered by the master's or the registrar's decision. It is the duty of the judge to consider the matter afresh and to exercise his own discretion, of course having due regard to the decision below but being in no way inhibited by it in the exercise of his discretion. By contrast, if the judge's decision is then appealed to the Court of Appeal, the Court of Appeal will only interfere if it is satisfied that the judge has exercised his discretion wrongly, applying principles to that determination which are now too well established to require repeating. (emphasis is mine)*
8. So the scope of hearing of an appeal from Master is hearing afresh on the evidence (documents) submitted.
9. Order 113 of the High Court Rules of 1988 state as follows:-
  1. *Where a person claims possession of land which he or she alleges is occupied solely by a person or persons (not being a tenant or a person holding over after the termination of the tenancy) who entered into or remained in occupation without his or her licence or consent or that of any predecessor in title or his or her, the proceedings may be brought by originating summons in accordance with the provisions of this Order.'*  
(emphasis is added)

10. In *Dutton v Manchester Airport* [1999] All ER 675 at 679 it was held

*'Order 113 was introduced in 1970 (by Rules of the Supreme Court (Amendment No 2) 1970, SI 1970/44), shortly after the decision for this court in Manchester Corp v Connolly [1970] 1 All ER 961, [1970] Ch 420. It had been held in that appeal that the court had no power to make an interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right – that is to say, against trespassers. The order does not extend or restrict the jurisdiction of the court.'*

11. So the procedure in terms of Order 113 of the High Court Rules can be instituted to obtain an order for eviction in rem (against all persons) and it can be obtained summarily. It can be obtained against an occupant, who has no legal possession.

12. The main argument for the Plaintiff- Appellant was that they entered in to the occupation in the year 2000 and 'the predecessors of title' to the land in issue was the NLTB (presently iTLTB) . The only letter that was issued to the Defendant is dated 1.8.2011 and this letter had granted him 2 weeks to submit certain things including a sum of money regarding his application for lease. There is no evidence of compliance of that letter.

13. The Plaintiff was granted an agreement for lease on 23.9.2011 on the said land Lot 1 on M 2229 (part of).

14. In *Dutton v Manchester Airport* [1999] All England Law Reports 675 at 679 at ( paragraph e) quoted a passage of *University of Essex v Djemal* [1980] 2 All ER 742 at 744, [1980] 1 WLR 1301 at 1304 (Buckley LJ's decision)

*'I think the order is in fact an order which deals with procedural matters in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorized adverse possession.'*

15. The statutory body iTLTB as the trustee of the land holding it for the benefit of the Fijian owners of the land. It had issued the agreement to lease to the Plaintiff. The Defendant had not obtained a lease or such licence though he had made an application for a lease. There is evidence of acknowledgment of the said application by the iTLTB, but he was required to fulfill some conditions within a

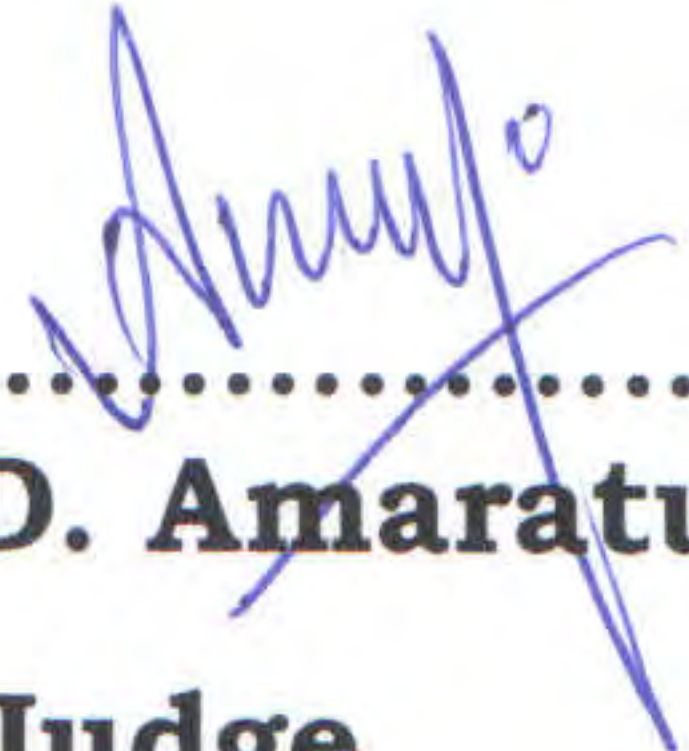
stipulated time and there is no evidence of such fulfillment of the said conditions. Defendant had not obtained a lease. So the decision of the Master is affirmed. In the circumstances I cannot see merits of the appeal, and it is dismissed

### **Conclusion**

The appeal is dismissed for failure to comply with the mandatory requirement of Order 59 rule 17(2). The appeal is struck off and by virtue of this the stay order is vacated with immediate effect. The cost of the appeal is summarily assessed at \$1,000. (this is in addition to the cost ordered by the Master). At the hearing the Plaintiff consented to grant time till 31.8.2016 for eviction.

### **Final Orders**

- a. In terms of Order 59 rule 17(3) the Appeal is deemed abandoned hence it is struck off and dismissed.
- b. The stay order granted in this matter is vacated with immediate effect.
- c. By consent the execution of the eviction is stayed till 31.8.2016.
- d. Cost of appeal is summarily assessed at \$1,000

  
.....  
**D. Amaratunga.**

**Judge**

**Date: 5<sup>th</sup> of July, 2016**

